IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1313 OF 1979

Rekha S.Panjabi .. Plaintiff

vs

Devkumar P.Jogi & ors .. Defendants

Mr.D.D.Madan, Sr.Advocate a/w Mr.Zai Andhyarujina

with Ms.Shona Malvi i.b Wadia Gandhy & Co

for Plaintiff

Mr.S.V.Oak for Defendants

CORAM : A.M.KHANWILKAR, J

DATED : 21st September, 2007

JUDGMENT

1. This suit is filed, inter alia for relief of declaration and specific performance of an agreement for sale in respect of property described in Exhibit A to the plaint except the bungalow occupied by the defendant nos.1 and 2.

2. Briefly stated, according to the plaintiff, the

plaintiff carries on business as a builder in the name and style of "R.K.Builders", as the sole proprietress thereof. The defendants are the owners of the property situated at Rajawadi chawl, Jambly galli, Borivali (West) Mumbai-400 092, admeasuring about 5900 sq.mtrs together with structures standing thereon. It is the case of the plaintiff that on or about 8th April, 1979 an oral agreement was reached between the plaintiff and the defendants in respect of the property descrbied in Exhibit A to the plaint (except the residential bungalow situate on the said property wherein the defendant nos. 1 and 2 were residing),for a lump sum consideration of Rs.7,00,000/- on terms and conditions agreed between the parties noted in paras 3 and 4 of the plaint. It was a concluded agreement between the parties. Pursuant to the said agreement, the plaintiff immediately paid a sum of Rs.5000/- and assured to pay balance earnest money deposit upon the execution of formal agreement for sale. The defendant no.2 acknowledged the receipt of Rs.5000/. Besides, the defendant no.2 recorded in writing vide letter dated 8th April, 1979 about the broad terms of the said oral agreement. The said writing is Exhibit B to the plaint.

3. It is the case of the plaintiff that after 8th April, 1979 the defendants represented to the plaintiff that the defendant's advocate had gone out of Mumbai and upon his return, sometime on 25th April, 1979, a formal agreement for sale would be prepared and executed. Instead, the plaintiff received a letter from the advocate of the defendants dated 24th April, 1979, falsely alleging that the plaintiff had pressurised the 2nd defendant to sell the suit property to the plaintiff for a lump sum amount of Rs.7,00,000/- and forced him to accept the deposit of Rs.5000/- and hastily procured signature of defendant no. 2 on the writing dated 8th April, 1979. The case of the defendant no.2 in the said letter,is that he had informed the plaintiff that no agreement would be executed if his mother and sister did not give consent. The 2nd defendant in the said communication further alleged that subject to consent of mother and sister, the plaintiff agreed to pay a sum of Rs.65,000/- being the balance of the earnest money of 10 % of the consideration amount on or before 23rd April, 1979 failing which the agreement would stand cancelled and defendants would forfeit the amount of Rs.5000/- paid by the plaintiff on 8th April, 1979. According to the Defendant No.2, the said terms were discussed in

the presence of three witnesses, who were present at the instance of the plaintiff. The defendants assert that during the dictation for typing the writing dated 8th April, 1979,the plaintiff had agreed about the abovesaid mode of cancellation of the writing - on that understanding the Defendant no. 2 signed the said writing. In substance, the case of Defendant No.2 is that the writing stood cancelled due to non-payment of balance earnest money of Rs.65,000/- before 23rd April, 1979. The plaintiff replied to the said notice through advocate vide letter dated 15th May, 1979 and denied the allegations contained therein.

4. The plaintiff then asserts that the 2nd defendant's advocate sent another letter dated 9th July, 1979, denying that the oral terms and conditions have been concluded on 8th April, 1979. Instead, returned the amount of Rs.5000/- along with the said communication. At the same time, called upon the plaintiff to complete the transaction of sale within 45 days from the date of the said letter if she so desired. The plaintiff on the other hand, apprehended that the defendants were likely to create third party rights in the suit property inspite of the concluded agreement in her favour, therefore, filed the present suit. In

the present suit, the plaintiff has reiterated the position stated by her in the communications sent to the defendants that she was ready and willing to perform her part of the contract and defendants were bound and liable to perform their part of the contract to transfer the suit property in her favour. The plaint was amended from time to time and amended prayer clauses in the suit reads as follows :

> (a) for a declaration that there is a valid, binding and subsisting Agreement for Sale of the said property described inExhibit A to the Plaint except the bungalow occupied by the defendant nos. 1 and 2 by the defendants to the plaintiff on the terms and conditions set out in paragraphs 3 and 4 of the Plaint and the said writing dated 8th April, 1979 (Exhibit B to the Plaint;
>
> (b) that the Defendants be ordered and decreed to specifically perform the said Agreement set out in paragraphs 3 and 4 of the Plaint together with the said writing dated 8th Apri 1979 (Exhibit B to the Plaint) and to do all things necessary and to execute all necessary conveyance, documents, deeds and things to effectuate the transfer of the said property in favour of the Plaintiff;
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> (c) That in the alternative to prayers (a) and (b) above:
>
> (i) the defendants be ordered and decreed to pay to the plaintiff a sum of Rs.2,00,000/- (Rupees Two lacs only) or such other sum as may be determined by this Hon'ble Court together with interest thereon at the rate of 15 % per annum from the date of the suit till payment or realisation as per particulars of claim Exhibit G to the plaint as damages in lieu of specific performance ;

(ii) that the defendants be ordered and decreed to pay to the plaintiffs the said sum of Rs.5000/- together with interest thereon at the rate of 15 % per annum from the date hereof till payment or realisation

(iii) that it may be declared that the said property described in Exhibnit A to the plaint except the bungalow occupied by the defendant nos. 1 and 2 is charged with the payment by the defendants to the plaintiff of the said sum of Rs.5000/- and interest thereon as set out in prayers (c) (ii) above

(iv) that the said property described in Exhibit A to the plaint (except the bungalow occupied by the defendant nos. 1 and 2) be sold by and under the directions of this Hon'ble Court in the event of the defendants failure to pay the said sum of Rs.5000/- and the net sale proceeds thereof be applied in or towards the satisfaction of the plaintiff's dues under prayer (c) (ii) above ;

(d) that pending the hearing and final disposal of the suit the Court Receiver or some other fit and proper person be appointed a receiver of the said property described in Exhibit A to the plaint, except the bungalow occupied by the defendants nos. 1 and 2 with all powers under Order XL, Rule 1 of the Code of Civil Procedure 1908 ;

(e) that pending the hearing and final disposal of the suit the defendants their servants and agents be restrained by an interim order and injunction of this Hon'ble Court from in any manner disposing of, alienating, encumbering, transferring, inducting any person into, parting with the possession of or creating any rights in to or upon the said property described in Exhibit A hereto or any part thereof except the bungalow occupied by the defendant nos. 1 and 2.

(f) for ad interim reliefs in terms of prayers (d) and (e) above ;

(g) for costs of the suit.

(h) for such further and other reliefs as

the nature and circumstances of the case may require.

5. The defendants after entering appearance in the present suit filed a joint written statement. In para 2 of the written statement, it is stated that the defendant no. 3 has no interest in the suit property and that the property belongs to defendant nos. 1 and 2 exclusively. It is stated that portion of the property is owned exclusively by defendant no.1 and other portion thereof is jointly owned by defendant nos. 1 and 2. It is stated that the entire property inclusive of the residential bungalow belongs jointly to the defendant nos. 1 and 2, which is now covered by final plot nos. 76 and 73 of TPS III Borivali respectively admeasuring 1151.70 sq.mtrs and 3096 sq.meters. (total 4247.70 sq.mtrs). The defendants dispute the correctness of the description of the suit property given in Exhibit A. Here it may be mentioned that during the pendency of the suit, the plaintiff amended the description of the suit property given in Exhibit A; and by way of further amendment which is granted in terms of order dated 13th September, 2007, the plaintiff has been permitted to amend Exhibit A. In view of the said amendment the case

made out by the defendants about the nature of property or description of the suit property, does not survive.

6. Be that as it may, it is the case of the defendants that the residential bungalow on the suit plot of land was jointly owned by defendant nos. 1 and 2 and the surrounding requisite open space of the bungalow plot with excess land, all together admeasured about 725 sq.mtrs (which will have to be excluded not forming part of the agreement). In para 3 of the written statement, the defendants have merely denied the terms and conditions stated in para 3 of the plaint being arbitrary and ever agreed upon. In so far as writing dated 8th April, 1979 Exhibit B to the plaint, the case of the defendants is that the same was foisted on the defendants and the terms and conditions set out were unreasonable and fictitious. In para 4 of the written statement, the defendants assert that the plaintiff merely paid Rs.5000/- as against the lump sum price referred to in Exhibit B-which did not establish the intention of the plaintiff to pursue the deal. The defendants have denied that Exhibit B to the plaint refers to the same terms as agreed upon. At the same time, in para 5 of the written statement,

the defendants have stated that no agreement apart from Exhibit B to the plaint exists. This is clear admission of existence of oral agreement as recorded in writing Exhibit B. The defendants in para 6 of the written statement have denied that they had made any representation to the plaintiff that their advocate had gone out of Mumbai and that the draft copy of sale agreement will be forwarded, prepared and/or executed only after the return of their Advocate to Mumbai on 25th April, 1979.

7. In para 7 of the written statement it is the case of the defendants that the circumstances would clearly show that the plaintiff was reluctant to complete the transaction. It is stated that at no stage the plaintiff ever challenged the defendant's title. Inspite of that, the plaintiff did not proceed to complete the transaction. It is the case of the defendants that the plaintiff did not chose to reply to the notice sent on 9th July, 1979 providing for time to be the essence of contract, but has chosen to approach this Court only with a view to drag the matter. The defendants have then asserted that the plaintiff has not been able to show his readiness and willingness and capacity to complete the transaction and for that reason no indulgence should be shown to the plaintiff. In

para 8 of the written statement, the defendants have stated that Exhibit B to the plaint is capable of enforcement without introducing unreasonable and fictitious terms and conditions and that there was no agreement apart from Exhibit B to the plaint. The defendants denied the existence of any other agreement as stated by the plaintiff in para 3 and 4 of the plaint. In respect of the alternative relief claimed by the plaintiff, the defendants in para 9 of the written statement have denied their liability in any manner. It is asserted that the plaintiff has not established the factum of readiness and willingness and capacity to perform the contract by paying the remaining consideration. It is stated that the plaintiff paid a meagre sum of Rs.5000/- and failed to discharge her obligation. Hence, was not entitled for any relief. Moreover, even without a decree, the defendants have already returned Rs.5000/- to the plaintiff. On the above basis the defendants urged that the suit deserves to be dismissed being devoid of merits.

8. On the basis of the pleadings, the Court proceeded to settle and frame the issues on 20th January, 2000. The plaintiff filed the affidavit of her husband, who is her Constituted Attorney in

lieu of examination-in-chief. The plaintiff has also produced the compilation of documents. The plaintiff has not examined any other witness. The defendants on the other hand have examined defendant No.2 who has filed his affidavit in lieu of examination-in-chief. In so far as the cross-examination of defendant no.2 is concerned that was done before the Court Commissioner who in turn has submitted his report and the relevant evidence was taken on record. As the defendants did not examine any other witness, the evidence was closed and the suit placed for oral arguments. According to the counsel for the plaintiff, some of the issues originaly framed would require restructuring. Accordingly, after hearing the counsel, the issues have been recast. The issues are now reframed with the consent of the counsel,the same read thus:

ISSUES

1. Does the plaintiff prove that the defendants entered into an agreement of sale in respect of the suit plot of land consisting 5900 sq.mts with the structure standing thereon for a consideration of Rs.7,00,000/- ?

2. Does the plaintiff prove that they are always ready to perform part of the contract but the defendant committed breach of the contract ?

3. Issue No.3: Deleted

4. Does the plaintiff prove that out of the consideration, the plaintiff would pay to the defendants 10 % of the aggregate consideration as earnest money ; another 40 % of the aggregate consideration on possession being handed over to the plaintiff after sanction of plans, clearance of title and grant of requisite NOC under the Urban Land (Ceiling and Regulation) Act, 1976 ; another 40 % within one year from the date of handing over possession, the last 10 % to be kept deposited with the plaintiff's Advocates until execution of the conveyance by the defendants and the production of the requisite certificate under section 230 A of the Income Act Act, 1961 ;

5. Issue No.5 : Deleted

6. Does the plaintiff prove that agreement was partly oral and some of the terms and conditions were reduced into writing dated 8/4/79 ?

7. Do the defendants prove that they repudiated the agreement by their letter dated 24/4/1979 contending that they were forced to enter into the aforesaid agreement ?

8. Are the plaintiffs entitled to claim specific performance of the contract by compelling the defendants to comply all the terms and conditions as set out in paragraph 3 of the plaint ?

9. Is the plaintiff in the alternative entitled to claim damages @ of Rs.2,00,000/- for breach of contract committed by the defendants ?

10. Is the plaintiff entitled to claim interest on the said amount of damages at the rate of 15 % per annum?

11. In the alternative to specific performance and in addition to damages and interest thereon, is the plaintiff entitled to return of Rs.5000/- with interest at the rate of 15 % per annum ?

12. Do the defendants prove that they have

refunded Rs.5000/- to the plaintiff on account of plaintiff not being ready and willing to perform his part of the contract ?

13. Is the plaintiff entitled to a charge on the suit property to secure the repayment of the sum of Rs.5000/- together with the interest thereon ?

14. What Order ?

Reasons

Issue Nos.1, 4 and 6

9. In so far as Issue No.1 is concerned, on the basis of the rival pleadings, it is seen that the defendants admit the execution of writing Exhibit B to the plaint. The same is on a Rs.5 stamp paper. It is a typed document on a stamp paper executed by the defendant no.2 in favour of R.K.Builders. Signature of witnesses appear on this document. The document has been proved in evidence and exhibited as Exhibit P-2. The same reads thus:

" From: Devkuver Ben Pranlal Jogi
Mr.Chandrasen Pranlal Jogi,
Rajwadi chawl, Jamili Gully,
Borivali (W) Mumbai-92

To,

M/s R.K.Builders,
52,Mangal Kunj,
S.V.Rd, Borivali (W)
Bombay-400 092

We the undersigned owner of the Rajawadi chawl situated at Jambligully, Borivali (W) Bombay 400 092. We hereby confirmed to sale the above property to M/s R.K.Builders, the

area of the plot admeasuring approximately 5900 sq.mts with all the tenants except our residence bungalow. We are confirming lum-sum price of the plot Rs.7,00,000/- (Rupees seven lakh only). We are received Rs.5000/- (Rupees Five thousand only) cash as deposit from M/s R.K.Builders as per our oral terms and conditions.

Thanking you,

Yours faithfully,
sd/
(Mr.Chandrasen Pranlal Jogi)
Owner"

(Emphasis supplied)

10. It is manifest from this document that it establishes the position that oral terms and conditions were agreed upon between the parties on the basis of which the suit property was to be sold in favour of the plaintiff for a lump sum price of Rs.7,00,000/- and that the defendant no.2 received an initial amount of Rs.5000/- in that behalf. It is therefore, admitted position that there was an oral agreement arrived at between the parties. The real issue is about the exact terms and conditions agreed upon between the parties as per the said oral agreement.

11. The plaintiff in para 3 of the plaint has given the details of the terms and conditions of the oral agreement. The defendants on the other hand have disputed those terms and conditions and assert that the same are unreasonable and

fictitious. For the time being suffice it to observe that the writing Exhibit P-2 establishes the fact that there was a concluded contract between the parties to transfer the suit plot in favour of the plaintff. The description of the property to be so transferred has been spelt out. Similarly, the consideration for which the property is sold is also indicated. It also indicates that the initial amount of Rs.5000/- was paid to the defendants.

12. The next question is whether the plaintiff has established the case in respect of the terms and conditions orally agreed upon between the parties as set out in para 3 of the plaint.

13. The plaintiff's witness in his evidence has deposed as to how negotiation for sale of the suit property commenced. He has stated that one O.P.Sharma was a common agent/property dealer who facilitated the sale transaction. It is stated that the contract was concluded after three meetings were held on different dates-which were attended by the defendant no. 2, the plaintiff, the said O.P.Sharma and relatives and friends of defendant no.2. The witness in his evidence has referred to the first meeting dated 2nd March, 1979

and persons who were present during the said meeting. In para 8 of his evidence he has spoken about the events that transpired in the said meeting which was held in the office of the plaintiff. The plaintiff's witness, in para 22 of his evidence, has then referred to the 2nd meeting held on 11th March, 1979. He has also referred to presence of six persons in the said meeting, held at Sahyadri Restaurant, S.V.Road, Kandivli, Mumbai. In para 25 of his evidence, Plaintiff's witness has spelt out the events which transpired in the second meeting, which eventually was held at 12.30 in the afternoon. The witness has then given details about the events that transpired after the second meeting, till the third meeting was held on 8th April, 1979. In para 31, the witness has given details of persons who were present in the third meeting,which was held in his office at 8 p.m. The witness has then spoken about the events that transpired in the said meeting and how the parties eventually agreed to close the transaction on the terms and conditions specified in para 32 of his evidence.

14. As per the said understanding, the plaintiff's witness in the first place, wrote down the broad terms on which the contract was concluded and the

said writing was typed on a stamp paper. The defendant no.2 then put his signature. The plaintiff's witness has deposed that he was personally present in all these meetings and has personal knowledge about the events that transpired during such meetings. The witness has also deposed about the payment of Rs.5000/- in cash to defendant no. 2 at the time of execution of the writing Exhibit P-2. The plaintiff's witness has also deposed about the fact that the signature of defendant no. 1 did not appear on the said writing. He has explained that it was too late to go to the house to get the signature of defendant no.1. The witness has then spoken about the terms and conditions which were agreed between the parties, in para 37 of his evidence. He has also explained that the expression " lump sum " does not mean that the amount was payable at one time. Whereas, it means that the aggregate amount of Rs.7,00,000/- was payable for purchase of an area admeasuring 5900 sq.mtrs; and the said amount was not arrived at on the basis of per sq metre rate. The plaintiff's witness has then spoken about the participation of one O.P.Sharma on 10th April, 1979. He has then stated that they visited the house of defendant no.2 on 10th April, 1979 when defendant no.2, defendant no.1 J.H.Sindhbad and

J.K.Khatri were present. He has stated that in presence of these persons defendant no.2 informed that his lawyer was out of Mumbai and would be returning on or after 25th April, 1979 and on his return the draft agreement of sale in respect of the suit property will be prepared and forwarded to the advocate for the plaintiff. The witness has then asserted that neither defendant no.1 nor defendant no.2 disputed the fact of having agreed to sell the suit property to the plaintiff. In fact, they assured to complete the transaction after their advocate would return to Mumbai. The witness has then spoken about the details as to how he was required to go out of Mumbai which fact he had intimated to the defendants; with a clear intimation that if, in the meantime, the draft agreement for sale was ready, the same can be forwarded to the plaintiff's advocate, so that, on his return to Mumbai on 1st May, 1979, further steps for execution of the agreement can be taken. He further states that on his return to Mumbai on 1st May, 1979 it was learnt that two letters were received from the advocate for defendant no. 2 and defendant no.1 and 3 respectively. He has then spoken about the steps taken by him to give reply to the said letters and asserting the correct position. He has also spoken about the false

allegation/statement made in relation to the agreement for sale noted in the said letters received for and on behalf of the defendants; wherein the defendants have asserted that there was agreement between the parties to pay Rs.65,000/- on or before 23rd April, 1979, failing which the agreement for sale would stand cancelled and determined. He has then spoken about the reply given by the plaintiff's advocate to the said two letters. The witness has also proved the said correspondence as well as writing Exhibit P-2. He has also spoken about the letter received from the advocate for the defendants on 9th July, 1979. He has then stated that on receipt of letter dated 9th July, 1979, the plaintiff had no option but to rush to this Court for claiming specific performance of the agreement against the defendants and for grant of further reliefs. He has asserted in para 64 that the plaintiff had sufficient money at the relevant time to make payment towards the consideration for purchase of the suit property. He has stated that in October, 1979,the plaintiff agreed to purchase another property at Kanderwadi Borivali, Mumbai for a sum of Rs.25,00,000/- and paid instalment between 9th October, 1979 to 26th September, 1981. On that basis, it is stated that the plaintiff had sufficient means to enable her to

make the payment of the balance consideration being Rs.6,95,000/ for purchase of the suit property. He has then deposed about the valuation of the suit property done by an approved valuer in his report dated 23rd June, 2003 being a sum of Rs.25,00,000/. He has further stated that in the valuation report it is mentioned that the area of the suit property is in fact 4,247 sq.mtrs (as per T.P.Scheme) and not 5,900 sq.mtrs as specified in the writing dated 8th April, 1979. He has then stated that notwithstanding the reduced area of the suit property, the plaintiff was ready and willing to purchase the suit property for a lumpsum consideration of Rs.7,00,000/- as agreed between the parties.

15. Plaintiff no.1 has been cross examined by the defendants. The cross examination is very brief. In fact, nothing has come out in this cross examination so as to contradict the witness. Indubitably, this witness is none other then the husband of the plaintiff. This witness was associated in the negotiations and present when the oral agreement was arrived at. He has deposed in relation to relevant facts on the basis of his personal knowledge. Thus understood, this witness was competent to depose about the matter in issue.

The evidence of this witness has remained unshaken.

16. We shall now analyse the ineffectiveness of the cross-examination of this witness. The first question put during cross examination was that he had not filed writing dated 8th April, 1979 in Court. Here, it is relevant to mention that the said writing Exhibit B to the plaint has been taken on record on 29th January, 2007. It is not as if the said document has not been exhibited. The next question put to this witness was that Exhibit B to the plaint (Exhibit P-2) does not bear the signature of the plaintiff but it only bears signature of defendant no.2. That does not take the matter any further.

17. The witness answered the other questions as follows:

> "3. I am now shown the document which is annexed as Exhibit F to the plaint. This is a letter written by the defendant's advocate to the plaintiff's attorney. I have not encashed the cheque of Rs.5000/- which was sent with that letter. I wanted the plot, therefore I have not encashed the cheque. I have not rendered the consideration of Rs.7 lacs to the defendants at any time prior to the filing of the suit.
>
> "4. It is not correct to say that in Borivili prices of land are always rising. Sometimes they rise and some times they do not.

5. It is not true to say that defendants were willing to pay me Rs.2 lacs as compensation but I did not accept the same. It is not true to say that I did not possess Rs. 7 lacs and that I was not willing to pay Rs,. lacs. The money was in the Bank. The name of the bank is South Indian Bank Ltd. I do not recall the account number. I have the Bank pass book.

6. I do not know whether the present price of the suit property is Rs. 4 crores. I however, say that the prices have gone up substantially. I deny that I was never ready and willing to perform my part of the contract.

Re-examination by Mr.Colabawala declined."

18. This is the only cross examination of plaintiff's witness. In so far as the questions put in para 1, it was presumably to confront the witness that the document was not taken on record. However, Exhibit B to the plaint has been proved by the plaintiff's witness and in fact the same has been taken on record in terms of order dated 29th January, 2007.

19. Significantly, the defendants have admitted the execution and existence of the said document. In para 2 of the cross-examination, the defendants have proceeded on the basis that there was a concluded contract between the parties for sale of the said property in favour of the plaintiff for a lump sum price of Rs.7,00,000/-.

20. The attempt in cross examination was to bring on record that the plaintiff was not ready and willing to discharge her obligation. It was suggested that the plaintiff did not deposit the amount of Rs.7,00,000/- in Court. The fact that the plaintiff did not deposit the consideration amount in Court does not take the matter any further. It is not in dispute that there is no formal order passed by this Court requiring the plaintiff to deposit the said amount. If the Court were to direct the plaintiff to deposit the amount, failure on the part of the plaintiff to comply with such direction would have been a relevant fact. Significantly, on the factum of readiness and willingness of the plaintiff there is no cross examination in the context of the facts stated by the plaintiff's witness in para 64 and 65 of his evidence.

21. The next line of cross examination is only to bring on record that the price of land in Borivali were constantly rising. Suggestion is given to this witness that the present price of the suit property is Rs.4 crores. Suggestion is also given to the plaintiff's witness that the plaintiff did not pay Rs.7,00,000/- and was not willing to pay the said amount, which suggestion is not only

denied by the witness, but he has asserted that the money was in the bank ready for payment. The witness has also stated that he had the bank pass book. No attempt was made by the defendants to call upon the witness to produce the said bank pass book to doubt the correctness of the stand taken by him that money was lying in the account of South Indian Bank Ltd as stated in his examination-in-chief. With such kind of cross examination, there is hardly any reason to doubt the case of the plaintiff.

22. Besides, the evidence of the defendants also makes an interesting reading. The defendants have filed an affidavit of defendant no. 2, in lieu of examination in-chief. He has admitted the signature on the writing in Exhibit B to the plaint. The defendant no. 2 has then stated that Punjabi did not put his signature to show acceptance. However, this plea is of no avail to the defendants, having admitted that there was a concluded contract between the parties. The fact that there was a concluded contract between the parties is not only spelt out from the writing Exhibit B to the plaint, but also from the subsequent letters written by the advocate for defendant nos. 1 to 3. In fact, in the letter

dated 9th July, 1979, the defendants called upon the plaintiff to complete the transaction within 45 days.

23. The defendants' witness have then disputed that the terms and conditions as suggested by the plaintiff were agreed upon. According to him, the same were figment of imagination of the plaintiff. In para 5 of the affidavit the defendant's witness has stated that the plaintiff was not ready and willing to comply with her obligation. It is also mentioned that, in fact, a proposal was given to the plaintiff that she would be compensated by payment of Rs.2 crores, which proposal was given without prejudice. The defendant's wintess has then asserted that the plaintiff did not proceed to make any application to the Urban Land Ceiling Authorities to issue a certificate or to the income tax authorities. It is then stated that the property prices have substantially increased and the valuation of the property is stated to be Rs.4 crores as per government Ready Reckoner. According to this witness, the plaintiff has not shown readiness and willingness to discharge her obligation.

24. The defendant's witness has been

cross-examined on material aspects and was confronted with Exhibit B and had to accept that the said writing dated 8th April, 1979 did not refer to the fact of 3 months to complete the transaction. Nevertheless, the witness maintained that it was agreed that the transaction was to be completed with down payment within three months. The witness has admitted that no power of attorney was executed in favour of the plaintiff authorising her to make an application on behalf of the owners to the Urban Land Ceiling Authorities. This witness has also admitted that after finalisation of town planning scheme area of the property is now approximately 4247.75 sq.mtrs and not 5900 sq.mtres. The witness has given details about the number of tenants in the property and the area occupied by the bungalow and by the tenants respectively.

25. After considering the oral and documentary evidence on record, there is hardly any doubt that there was a concluded contract between the parties in respect of the suit plot as asserted by the plaintiff. The terms and conditions of the oral agreement have been proved by the plaintiff. That evidence has gone unchallenged. The description of the plot is specified in writing dated 8th April,

1979 Exhibit P-2. Indeed, the area of the plot is reduced after the town planning scheme to 4247.75 sq.mtrs. But, that would not affect the right of the plaintiff to prosecute her claim of specific performance of agreement. From the evidence both oral as well as documentary, it is amply clear that the parties were Ad idem about the property which was to be transferred in favour of the plaintiff. The plaintiff has described in Exhibit A (as amended) to the plaint, which reads thus :

> . " All that piece or parcel of land, hereditaments and premises together with the structures standing thereon known as Rajawadi chawl, situate lying and being at Jambli Gulli, Cross Road and containing by admeasurement 5900 sq.meters or thereabouts (but admeasuring 4147.70 sq.mtrs or thereabouts according to the final Town Planning Scheme -III of Borivili) and bearing C.T.S.Nos. 728/ B, admeasuring 593.1 sq.mtrs or thereabouts 729/B (part) admeasuring 1151.7 sq.mtrs 730/B (now included in C.T.S.No.728/B under the Final Town Planing Scheme - III) admeasuring 626.1 sq.mtrs and 106/K, admeasuring 1874.8 sq.mtrs and original plot no.91, final plot no.76 and final plot no.73 of Town Planning Scheme No.III of Borivili and bounded as follows i.e. to say on or towards the West by a Nalla or towards the South by Gomti Building on or towards the north by a Nalla and or towards the east by a property belonging to Vrajlal Katau. "

Counsel for the plaintiff has rightly relied on the decision of the apex Court in the case of Brij Mohan vs Sugra Begum & ors reported in (1990) 4

Supreme Court Cases 147 in particular para 20 which reads thus :

" We have given our careful consideration to the arguments advanced by learned counsel for the parties and have thoroughly perused the record. We agree with the contention of the learned counsel for the appellants to the extent that there is no requirement of law that an agreement of contract of sale of immovable property should only be in writing. However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for sale of immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were

concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement. " (Emphasis supplied)

26. In the present case, I find that the parties were in complete agreement as to how the property was to be sold to the plaintiff which position is not only reflected from the writing Exhibit P-2 dated 8th April, 1979 but, subsequent letters as well as oral evidence given before the Court. In the circumstances, I have no hesitation in answering issue no.1 in favour of the plaintiff.

27. As it is not a case of written agreement but, one of oral agreement, it will have to be answered on the basis of contemporaneous materials, as well as pleadings and oral evidence adduced before this Court. The details of the terms on which the agreement was arrived at, have been, in the first place, noted by the plaintiff in letter dated 15th May, 1979 sent in reply to the communication received from the advocate for the defendants. Indeed, the defendants have disputed the said terms

and conditions suggested by the plaintiff on the ground that they are unreasonable and fictitious. According to the defendants, the agreement was for one time payment to be made by the plaintiff.

28. The terms and conditions of a concluded agreement has been reiterated in para 3 of the plaint. Besides the stand taken in para 3 of the plaint, the plaintiff's witness has spoken about the events which transpired in the three different meetings and about the final terms and conditions agreed between the parties as are noted in para 3 of the plaint. The plaintiff's witness has also explained the meaning of expression " lump sum " referred to in writing dated 8th April, 1979 Exhibit B to the plaint in para 39 of his evidence. There is hardly any material on record to doubt the case made out by the plaintiff. In fact, the case made out by the plaintiff about the stated terms and conditions agreed upon has gone unchallenged. The cross-examination of the plaintiff's witness essentially proceeds on the premiss that the plaintiff was not ready and willing to discharge her obligation and that the value of the property has significantly increased. That however, does not take the matter any further.

29. Thus understood, there is no reason to doubt the case made out by the plaintiff and it will have to be held that the plaintiff has proved the terms and conditions which are orally agreed upon between the parties.

30. Argument of the defendants is that, the details about the so called three different meetings has come up for the first time in oral evidence. No such case is made out in the plaint. This argument clearly overlooks that the plaint gives relevant material facts. The plaintiff has elaborated those material facts and provided particulars during evidence. That does not mean that the fact alleged about the modality of payment agreed upon has not been substantiated.

31. In my opinion, on analysis of the contemporaneous material and the pleadings in the plaint and more particularly the oral evidence of the plaintiff which has remained unchallenged, I have no hesitation in accepting the plaintiff's claim that the consideration in respect of the suit plot was to be paid in the manner specified in para 3 (e) of the plaint. The plaintiff has proved even that position. Accordingly, I would answer issue no.4 in favour of the plaintiff.

Issue No.2:

32. In so far as this issue is concerned, it is seen that there was a concluded contract between the parties to transfer the suit property in favour of the plaintiff. The plaintiff was told that a formal draft agreement for sale will be prepared by the defendants' Advocate after he returns to Mumbai on 25th April, 1979. The plaintiff has not only averred in the plaint but, also stated during the evidence that the plaintiff alongwith her husband (PW-1) were required to go out of Mumbai and had informed about the same to the defendant no.2. There is absolutely no cross examination on this aspect. It is also the plaintiff's case that on return to Mumbai, the plaintiff came across the two letters sent by the advocate for the defendant nos. 2 and 3 and defendant no. 2 respectively. The plaintiff gave reply to the said communication by advocate's letter dated 15th May, 1979. In the said letter it is stated that the plaintiff was ready and willing to comply with the oral terms and conditions and discharge her obligation. Instead, the 2nd defendant sent a letter dated 9th July, 1979. The plaintiff having realised that

defendants were trying to wriggle out of the concluded contract; and apprehended that the defendants were avoiding to discharge their obligation under the concluded contract, the plaintiff rushed to this Court. Even in the plaint in para 10, the plaintiff has clearly stated that she was ready and willing to perform her part of the contract and she had all the means to discharge her obligation.

33. The fact that the plaintiff was always ready and willing to perform her part of the contract is even reiterated during the evidence of plaintiff's witness as can be seen from para 62 to 66 of the evidence. The plaintiff has gone to the extent of deposing before this Court that even though the area of plot has now been reduced to 4247 sq.mtrs as per town planning scheme, nevertheless the plaintiff was willing to complete the transaction by paying up the same lump sum consideration of Rs.7,00,000/-. The plaintiff has also indicated about the circumstances to establish that she had the means during the relevant time to pay Rs.6,95,000/-. In the cross examination, except a vague statement nothing has come out as to in what manner the plaintiff was incapable to discharge her obligation of paying balance Rs.6,95,000/-. In

fact, the plaintiff's witness has clearly stated that during the relevant time requisite amount was lying in South Indian Bank Ltd and he had the bank pass book.

34. In other words, there is ample evidence on record to indicate that the plaintiff was always ready and willing to perform her part of the contract. The cross examination of the plaintiff's witness that the valuation of the property has substantially increased is of no avail. According to the defendants, value of the suit property will be around Rs.4 crores as of now. Assuming it to be so, it cannot be of any relevance for deciding the point in issue.

35. Counsel for the plaintiff has rightly placed reliance on the decisions of the apex Court in the case of S.V.R. Mudaliar (dead) by lrs & ors.vs Mrs Rajabu F.Buhari (dead) by lrs & ors reported in AIR 1995 SUPREME COURT 1607, particularly on para 27, which reads thus:

> " In so far as the delay in the disposal of the case and the rise in prices during interregnum, Shri Parassaran urges that the delay ot having been occasioned by any act of the plaintff he may not be punished for the same on the principle of "actus curiae neminem gravabit"- an act of the Court shall prejudice no man. As regards the rise in

> prices the submission is that it should not weigh with the Court in refusing the relief if otherwise due, as opined in S.V.Sankaralinga Nadar v P.I.S.Ratnaswami Nadar, AIR 1952 Madras 389, which decision was cited with approval in Mir Abdul Hakeem Khan vs Abdul Mannan Khadri AIR 1972 Andhra Para 178. We are in agreement with this view because of the normal trend of rise in prices of properties situate especially in metropolitan city like Madras, where the property in question is situate. If merely because the prices have risen during the pendency of litigation, we were to deny the relief of specific performance if otherwise, due this relief could hardly be granted in any case because by the time the litigation comes to an end sufficiently long period is likely to elapse in most of the cases. This factor, therefore should not normally weigh against the suit or in exercise of discretion by a Court in a case of the present nature. "

Counsel for the plaintiff has also relied on two decisions referred to by the apex Court in above said reported judgment.

Accordingly, Issue No.2 also will have to be answered in favour of the plaintiff.

Issue No.3

36. In so far as Issue no.3 is concerned, the fact that a sum of Rs.5000/- was received by the defendants is an admitted position, there is no need to elaborate on this aspect. The Advocate

appearing for the parties fairly accepted that this issue be deleted.

Issue No.5:

37. Counsel appearing for the parties fairly accept that the same be deleted. Accordingly, it is not necessary to deal with this issue.

Issue No.7

38. In so far as the issue as to whether there was a concluded contract between the parties, that has already been answered in earlier part of this judgment. The question is whether the writing dated 8th April, 1979 Exhibit P-2 can be said to be product of under duress, coercion or deceit. Except the bare words of the defendants,there is no contemporaneous material much less any independent evidence to support that position. Whereas, it is seen that Exhibit P-2 was executed by the defendant no.2 in the presence of three witnesses. None of these witnesses have been examined by the defendants. No reason is forthcoming as to why those witnesses are not examined.

39. Besides, the plaintiff's witness, namely PW-1,

has asserted that he was personally present when the said document was executed and has spoken about the manner of execution thereof. In his cross examination, however, there is nothing to discard his version. In fact, there is not even a suggestion put to this witness in the context of the issue under consideration. Besides, the evidence of DW 1 does not take the matter any further on this aspect. It is not possible to countenance the claim of the defendants that the writing Exhibit P-2 was executed by the defendant no. 2 on 8th April, 1979 involuntarily.

40. Besides, on a careful examination of the letters sent on behalf of the defendants to the plaintiff, it is seen that the defendants are not disputing the fact that there was a concluded agreement and in particular of execution of the said writing between the parties. The defendants, in these letters at best, placed on record that if the plaintiff failed to pay the consideration amount within 45 days from 9th July, 1979, (the date of letter being Exhibit F to the plaint), the contract would stand cancelled and determined. Before expiry of the said period, the plaintiff rushed to this Court questioning the stand taken on behalf of the defendants. Assuming that there was

truth in the stand taken by the defendants in their Advocate's letter dated 24th April, 1979, the same was expressly given up by the defendants as can be seen from the letter dated 9th July, 1979 Exhibit F to the plaint. By this letter, the defendants called upon the plaintiff to proceed with the transaction provided the same was completed within 45 days, on payment of the entire consideration amount. Accordingly, Issue no.7 will have to be answered against the defendants as it is not possible to hold that the agreement reached between the parties on 8th April, 1979 was repudiated by the defendants on 24th April, 1979 because they were forced to enter into the same.

41. Assuming that there was repudiation of the agreement, the question is whether the said repudiation is valid and proper. The basis on which the defendants proceeded to repudiate, vide their letter dated 24th April, 1979, cannot be said to be just and valid. Because, there was no justification to repudiate the concluded agreement especially when the plaintiff was ready and willing to perform her part of the contract in all respects as agreed to between the parties. Accordingly, Issue no.7 is answered against the defendants.

Issue No.8

42. In so far as Issue no.8 is concerned, as I have already found that there was a concluded contract between the parties and that the plaintiff was always ready and willing to perform her part of the contract, it would necessarily follow that the defendants ought to be compelled to discharge their obligation under the said agreement. In my opinion, there is no tangible material on record to take the view that the plaintiff is not entitled for the relief of specific performance. I am conscious of the fact that it is the discretion of the Court to grant a decree of specific performance, but the discretion cannot be exercised arbitrarily; but should be based on sound, reasonable and guided on judicial principles. As the material on record indicates that the plaintiff was always ready and willing to perform her part of the contract, there is no reason to deny the relief of specific performance to such a plaintiff. The only argument canvassed on behalf of the defendants that valuation of the property has considerably increased, cannot be the basis to deny the relief of specific performance. This issue has already been answered in the earlier part of the judgment while referring to the dictum of reported decision

relied upon by the plaintiff. Accordingly, Issue no. 8 also deserves to be answered in favour of the plaintiff.

Issue No. 9

43. In so far as Issue no. 9 is concerned, as I have already answered the main issue in favour of the plaintiff, question of considering the prayer for alternative relief does not arise. Assuming that I was required to go into this question, in my opinion, there is clear admission on the part of the defendants that the present value of the property is to the tune of Rs.4 crores. If the plaintiff was to be compensated by way of damages, for breach committed by the defendants, the plaintiff would be entitled for damages in the sum of Rs.4 crores. Notably, section 21 of the Specific Relief Act, 1963 would enable the Court to award compensation in addition to relief of specific performance claimed by the plaintiff in a given case. However, in the present case, it is not necessary to dwell upon that issue as the plaintiff is claiming compensation only by way of alternative relief and not in addition to the relief of specific performance.

Issue No. 10

44. That takes me to issue no.10. Even this issue will have to be answered in favour of the plaintiff, if this Court were to refuse the relief of specific performance.

Issue No.11

45. In so far as Issue no.11 is concerned, even this issue does not require elaboration. Because, in the first place, I have already taken a view that the plaintiff is entitled for the relief of specific performance. Assuming that the plaintiff was not entitled for relief of specific performance in that event, I would have been inclined to allow the alternative relief of the plaintiff for claim of damages as also return of Rs.5000/- along with interest thereon which was paid by the plaintiff as initial amount when the contract was finalised between the parties.

Issue No.12

46. In so far as this issue is concerned, it is common ground that the cheque forwarded by the defendants alongwith letter dated 9th July, 1979

has not been encashed. In other words, the plaintiff has not received back the amount of Rs.5000/- which was initially paid by her at the time of finalising the agreement. The evidence on record does not permit me to hold that the defendants had sent cheque of Rs.5000/- to the plaintiff because the plaintiff was not ready and willing to discharge her obligation under the concluded contract. These aspects have already been dealt with in the earlier part of this order. Suffice it to observe that this issue needs to be answered against the defendants.

Issue No. 13

47. As the plaintiff has paid initial sum of Rs.5000/- to the defendants pursuant to the concluded contract in relation to the suit property, obviously the plaintiff is entitled to claim recovery of that amount along with interest from the sale proceeds of the property, if sold to third party. Suffice it to observe that it is not necessary to elaborate on this issue as I am inclined to grant relief of specific performance as claimed by the plaintiff.

Issue No.14

48. Taking over all view of the matter, I am inclined to grant relief of specific performance as prayed for by the plaintiff on condition that the plaintiff shall deposit the principal sum of Rs.6,95,000/- (being the balance consideration amount with regard to the suit property described in Exhibit A to the plaint) alongwith interest at the rate of 12 % p.a. acrrued thereon from the date of institution of this suit till its realisation, to be deposited in this Court within 12 weeks from today. I am inclined to direct the plaintiff to pay the said amount alongwith interest at the rate of 12 % on the principal amount because the transaction in question was obviously a commercial transaction. The plaintiff in para 1 of the plaint admits that she is engaged in construction business. Obviously, the plaintiff wanted to purchase the property for development. Accordingly, keeping in mind the principle flowing from the provision of section 34 of Code of Civil Procedure, awarding 12 % interest on the outstanding consideration payable to the defendants from the date of institution of the suit will be just, proper and reasonable and meet the ends of justice. In that, the defendants will be suitably compensated for the steep rise in the value of

properties which they committed to sell to the plaintiff in the year 1979. It will be open to the defendants to withdraw the amount deposited by the plaintiff in this Court, failing which the amount will stand invested in a fixed deposit scheme of any nationalised bank. The defendants will simultaneously have to execute all the necessary documents for conveying the suit property in favour of the plaintiff. If the defendants fail to execute such documents inspite of deposit of the entire decretal amount by the plaintiff in this Court, the Prothonotary and Senior Master of this Court may proceed to execute the necesary documents for conveying the suit property in favour of the plaintiff for and on behalf of the defendant nos.1 and 2 in terms of the order passed by this Court today.

O R D E R

(i) Accordingly, suit is decreed in terms of prayer clauses (a) and (b). Relief of specific performance is awarded in favour of the plaintiff as prayed with costs on condition that the plaintiff shall deposit the decretal sum of Rs.6,95,000/- along with accrued interest at the rate of 12 % p.a.

from the date of institution of the suit till the date of deposit/realisation within 12 weeks from today and further subject to necessary permissions to be obtained from the Municipal authorities or Government as the case may be.

(ii) If the plaintiff deposits the requisite amount in this Court as aforesaid, it will be open to the defendant nos.1 and 2 to withdraw the said amount and simultaneously execute the necessary relevant documents to convey the suit property in favour of the plaintiff.

(iii) In the event, the defendant nos. 1 and 2 fail to execute the necessary documents to convey the said property in favour of the plaintiff inspite of the deposit of the entire decretal amount in this Court, in above terms, the Prothonotary and Senior Master shall proceed to execute all such necessary documents for and on behalf of the defendant nos.1 and 2 so as to facilitate conveyance of the suit property in favour of the plaintiff in terms of this order.

(iv) Suit is decreed with costs on the above terms.

(A.M.Khanwilkar, J)